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No. 76-335

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDREW WILLIAMS, PETITIONER

v.

W. J. USERY, JR., SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 531 F. 2d 305.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1976. A petition for rehearing was denied on June 8, 1976. The petition for a writ of certiorari was filed on September 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion for a preliminary injunction

in an action filed by petitioner challenging a determination by the Secretary of Labor concerning the importation of temporary foreign agricultural labor and the effect thereof on wages and working conditions of domestic workers.

STATEMENT

In August 1975, the Secretary of Labor certified to the Commissioner of the Immigration and Naturalization Service that there were not sufficient domestic workers available to cut sugar cane in Florida and that the temporary employment of foreign workers at a rate of no less than $2.84 per hour would not adversely affect the wages and working conditions of domestic workers similarly employed.

The Secretary's certification was issued pursuant to the Immigration and Nationality Act, 66 Stat. 163, 168, 189, as amended, 8 U.S.C. 1101(a)(15)(H)(ii), 1184(a) and 1184(c), and regulations promulgated thereunder. To briefly summarize the statutory and regulatory scheme, Section 1101(a)(15)(H)(ii) provides that the term "immigrant" shall not include an alien who does not intend to abandon his foreign residence and "who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." Section 1184(a) provides that the admission of nonimmigrant aliens to this country shall be under "such conditions as the Attorney General may by regulations prescribe." Section 1184(c) provides that "[t]he question of importing any alien as a nonimmigrant * * * shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer."

By regulation the Attorney General has provided that every petition for the importation of nonimmigrant alien labor shall be accompanied by a certification by the Secretary of Labor or his designated representative that "qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed * * *." 8 C.F.R. 214.2(h)(3).

The Secretary of Labor has promulgated regulations governing the certification process. 20 C.F.R. 602.10. Before making a request for certification, an employer must "have filed at the local office of the State employment service an offer of employment for U.S. workers to fill such employment needs" at wages specified in the regulations; such offers "should be filed at the local office in sufficient time to allow the ETA 30 days to determine the availability of domestic workers * * *." 20 C.F.R. 602.10(b). Each request for certification must "describe all efforts made by the employer to obtain U.S. workers to fill the employer's need." 20 C.F.R. 602.10(c). Certification is authorized only upon a finding that the employer and the employment service will continue to endeavor to obtain domestic workers at wages and conditions as favorable as those offered to the foreign workers. 20 C.F.R. 602.10(d).

The Secretary has established wage rates that are "necessary to prevent adverse effect upon U.S. workers" and that must be paid to the temporary alien workers. 20 C.F.R. 602.10b. The regulations set forth a minimum hourly rate for agricultural workers in various States ($2.84 for Florida cane workers), permit piece rates so long as no worker earns less than the hourly rates, allow special piece rates that are designed to and do produce

earnings "the average of which for the weekly or bi-weekly period is 25 per cent higher than the hourly rates,"[1] and provide that when the "prevailing rate" in an area is higher than the specified hourly rate, the prevailing rate shall apply. 20 C.F.R. 602.10b.

In August 1975, the Secretary set the current hourly "adverse effect" wage rate for Florida sugar cane workers by adjusting the 1974 rate[2] upward 16 percent to reflect the increase in Florida's agricultural wages for the year reported by the United States Department of Agriculture. See *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (C.A. 5). Before that time, Florida cane growers made extensive efforts to recruit domestic cane cutters at $2.60 per hour, but obtained only 32 workers out of an anticipated 9,000 needed. As the district court found, the growers have continued their domestic recruiting efforts at the $2.84 rate (Pet. App. 3a-5a.)

After the Secretary's certification to the Commissioner of the Immigration and Naturalization Service, petitioner, a United States citizen and an unemployed migrant farm worker, filed a civil suit in the United States District

[1]Thus, if an employer elects to use the special piece rate, the *average* earnings of his employees must be at least 25 percent more than the specified hourly rate, although some employees may actually earn less than the specified hourly rate. An employer is not required to use the special piece rate, and the parties here have stipulated that no employer has applied to use the special rate.

[2]The 1974 rate was a minimum wage established by the Secretary of Argiculture under the Sugar Act of 1948, 61 Stat. 922, as amended, 7 U.S.C. 1100 *et seq.*, which expired at the end of the 1974 season. The Florida Sugar Cane League, Inc., an employer association, unsuccessfully challenged the authority of the Secretary of Labor to use this rate as a base. See *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (C.A. 5).

Court for the Southern District of Florida challenging the Secretary's certification and seeking to enjoin the INS from issuing any nonimmigrant worker visas pursuant to it.[3] Specifically, petitioner sought to require the Secretary to (1) determine the "prevailing wage rate" for sugar cane cutters in Florida; (2) require growers utilizing a piece rate system to guarantee hourly earnings 25 percent above the "adverse effect wage rate" or the "prevailing wage rate," whichever is higher; and (3) establish a 30-day recruitment period for domestic workers at the designated "adverse effect wage rate," before the Secretary's certification for foreign labor. Petitioner testified at the district court hearing on his motion for preliminary injunction that he was not interested in cutting cane at $2.84 an hour "but would consider cutting cane at $3.50 per hour" (Pet. App. 4a).

Following an evidentiary hearing, the district court found that petitioner "ha[d] failed to show any irreparable injury or reasonable likelihood of success on the merits" and denied his motion for a preliminary injunction (Pet. App. 12a). The court of appeals affirmed (Pet. App. B).

ARGUMENT

1. The only contention petitioner presses here is that the statutes and regulations require that the adverse effect wage rate be set sufficiently high to attract enough domestic workers to meet the employer's needs and thus, presumably, to preclude entirely the importation of foreign agricultural labor. The court of appeals properly rejected that contention.

[3]As noted above, n. 2, *supra*, prior to the promulgation of the adverse effect rate, the Florida Sugar Cane League, Inc., filed suit to enjoin the final promulgation of the proposed rate as too high.

The purpose of Congress in permitting the importation of temporary nonimmigrant labor was to find some means of "alleviating labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production,"[4] while at the same time ensuring that jobs would not be taken away from willing domestic workers. Congress obviously did not intend to require the government or the employer to prove that no domestic worker would perform the service at *any* price, but intended only to require reasonable efforts to obtain domestic workers under reasonable conditions.[5] Otherwise, Congress' manifest intent to permit importation of foreign workers under some circumstances would be nullified.

The regulations promulgated by the Attorney General and the Secretary of Labor ensure that those requirements are met and, further, that the importation will not adversely affect domestic wage scales. The record developed by the district court reflects that those conditions were satisfied in this case.

The Secretary's directive under 8 C.F.R. 214.2(h)(3) to ensure that domestic wages and working conditions are not adversely affected by the importation of foreign workers clearly does not authorize him to raise wages to a level irresistible to domestic employees. As the court of appeals stated (Pet. App. 3b):

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[4]H.R. Rep. No. 1365, 82d Cong., 2d Sess. 45 (1952).

[5]The cases cited by petitioner (Pet. 9-10) are not to the contrary. Moreover, those cases are concerned with standards for the admission of permanent immigrant workers under 8 U.S.C. 1182(a)(14) and not, as here, the admission of temporary nonimmigrant workers.

> Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. His authority is limited to making an economic determination of what rate must be paid all workers to neutralize any "adverse effect" resultant from the influx of temporary foreign workers. As we said in [*Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299, 301 (C.A. 5)], "[n]either the statute nor the regulations establish a formula for the Secretary's computation of this 'adverse effect wage rate.'" * * *
>
> [Petitioner's] notion of a wage rate, high enough to attract those domestic workers not otherwise willing to work in sugar cane, jumps well beyond the discretionary authority of the Secretary. Clearly, his authority to insure against a lowering of wages is hardly synonomous with the affirmative power to raise wages which [petitioner] here proposes. "Attractiveness" is the wrong test for measuring the Secretary's determination. [Footnote omitted.]

2. Petitioner has failed to show any irreparable injury by reason of the Secretary's certification. As the district court (Pet. App. 11a) and the court of appeals (Pet. App. 7b) noted, 20 C.F.R. 602.10(d)(2) imposes a continuing duty on employers to recruit domestic workers and grants such workers employment preferences even after the temporary foreign workers have been hired. In view of the absence of irreparable injury and petitioner's failure to demonstrate the Secretary's noncompliance with the statutes and regulations, the district court did not abuse its discretion in denying preliminary injunctive relief.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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